

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

<hr/>)	
In re:)	
)	
USGen New England, Inc.)	NPDES Appeal No. 03-12
Brayton Point Station)	
)	
NPDES Permit No. MA-0003654)	
)	
<hr/>)	

ORDER SCHEDULING ORAL ARGUMENT

On November 5, 2003, pursuant to 40 C.F.R. § 124.19(a), USGen New England, Inc. (“USGen” or “Petitioner”) filed a timely petition for review of the above-captioned National Pollutant Discharge Elimination System (“NPDES”) permit decision issued under the Clean Water Act (“CWA” or “Act”), 33 U.S.C. §§ 1251-1387, by Region I (“Region”) of the United States Environmental Protection Agency (“EPA” or “Agency”).¹ *See* Petition for Review of NPDES Permit Issued by Region I on October 6, 2003 (“Petition”). In addition to the Petition, USGen submitted several other motions to the Environmental Appeals Board (“Board”), including a motion requesting oral argument.² Request for Oral Argument (filed Nov. 5, 2003) (“Request”). This Order addresses USGen’s Request.

¹ The Region issued the permit decision, NPDES Permit No. MA 0003654, on October 6, 2003, for USGen’s power plant at Brayton Point Station in Massachusetts.

² Petitioner also filed a Motion for Leave to Submit Brief in Connection with Petition for Review, a Motion to Supplement the Administrative Record, and a Motion for Evidentiary Hearing. In connection with our granting review of the petition and setting up a briefing schedule, we granted Petitioner’s request to submit an additional brief. *See* Order Granting Review at 6-7 (EAB, Feb. 19, 2004). We also denied USGen’s Motion for Evidentiary Hearing by Order filed July 23, 2004. This order is available at <http://www.epa.gov/eab/other.htm>.

The Region filed a Response to the Petition on December 30, 2003. *See* EPA Region I Response to Petition for Review (“Response”). Along with its Response, the Region filed an opposition to USGen’s Request. EPA Region I Opposition to Request for Oral Argument (filed Dec. 30, 2003) (“Opposition”).

Since USGen’s filing of its Petition, seven other entities have filed motions to intervene and/or to file amicus curiae (“amicus”) briefs in this matter: the Conservation Law Foundation (“CLF”), the Massachusetts Department of Environmental Protection (“MA DEP”), Save the Bay (“STB”), the Department of Attorney General of the State of Rhode Island (“Rhode Island”), the Utility Water Act Group (“UWAG”), the Taunton River Watershed Alliance, Inc. (“TRWA”), and the Kickemuit River Council (“KRC”). On February 19, 2004, the Board granted review of the Petition and also granted amicus status to the first five entities listed above. *See* Order Granting Review at 5-7. The Board subsequently granted amicus status to TRWA and KRC, who had requested amicus status following the Board’s issuance of the Order Granting Review. *See* Order (EAB, May 4, 2004); Order (EAB, May 27, 2004). None of these seven parties have filed motions opposing USGen’s Request.

In its Request, USGen contends that oral argument would assist the Board for several reasons. Request at 1. USGen asserts that the issues presented are complex and numerous, that some of the issues present novel questions of federal law, that some of the issues present novel questions concerning the relationship between federal and state law, and that some of the issues involve detailed technical, biological, economic, and engineering analyses. *Id.*

The Region opposes the Request for several reasons. Opposition at 2-4. The Region first points out that neither the CWA, the associated regulations, nor the Board's procedures provide parties with a right to oral argument.³ *Id.* at 2. The Region next argues that, while it is true both that USGen has raised numerous issues in its appeal and that the issues addressed in the permit were many and complex, the issues presented on appeal of the permit do not "present the sort of complexities likely to be aided by oral argument." *Id.* Additionally, although the Region concedes that some of the issues presented by this permit may be less familiar to the Board, the Region contends that the administrative record in this matter is extensive and fully addresses all the issues raised by Petitioner. *Id.* at 2-3. The Region disagrees with USGen's position that the issues material to resolving the Petition involve novel questions of federal law or the relationship between federal and state law. *Id.* at 3. The Region also disagrees that oral argument is necessary to enable the Board to address the detailed technical, biological, economic, and engineering analyses, as review of the administrative record would provide sufficient information to assist the Board. *Id.* Finally, the Region states that it also opposes the Request because the motion is overbroad, failing to specify any particular issues whose resolution would be materially assisted by oral argument before the Board. *Id.* at 3-4. The Region believes that oral argument will only serve to delay resolution of the appeal. *Id.* at 3.

³ The Region notes, however, that the Board will require oral argument, either upon its own initiative or upon a party's request, where "it believes that argument would be of assistance in resolving the matter in dispute." *Id.* (citing the Board's "Frequently Asked Questions," number 23, *available at* <http://www.epa.gov/eab>).

After reviewing the Petition and all the participants' briefs filed thus far, the Board has determined that oral argument will assist it in its deliberations regarding this matter. The Petition raises several relatively novel and complex issues involving the interpretation and implementation of CWA sections 316(a) and (b), 33 U.S.C. § 1326(a), (b). The Petition also raises some complicated questions about the relationship between CWA section 316 and State water quality standards.

Accordingly, the parties are hereby requested to participate in oral argument⁴ beginning at 10:00 a.m. on Thursday, September 9, 2004, in the Administrative Courtroom, U.S. Environmental Protection Agency, EPA East Building, Room 1152, 1201 Constitution Avenue, N.W., Washington, D.C. Upon consideration of the length, complexity, and specificity of the particular arguments raised by each of the participants in their briefs, and in light of the number of participants in this permit appeal, the Board has allocated the time for this oral argument as follows:

- USGen – thirty minutes⁵
- Region – thirty minutes
- Massachusetts (MA DEP) – ten minutes
- Rhode Island – ten minutes
- Utilities Water Act Group (UWAG) – ten minutes
- Conservation Law Foundation (CLF) – ten minutes

⁴ Except for USGen (the Petitioner in this matter) and the Region (the permitting authority in this matter), participants may opt out from participation in the oral argument, if they so choose. If a participant decides to opt out of the oral argument, the Board will still consider the arguments presented in the briefs submitted by that entity when deciding the issues raised in the Petition.

⁵ At the outset of the proceedings, USGen, as Petitioner in this matter, may reserve up to five minutes of its thirty-minute allocation for rebuttal.

- Save the Bay (STB) – ten minutes
- Kickemuit River Council (KRC) – five minutes
- Taunton River Watershed Alliance (TRWA) – five minutes

The Board requests that the participants focus primarily on legal arguments involving the interpretation and implementation of CWA sections 316(a) and (b), 33 U.S.C. § 1326(a), (b). In addition, in the interest of efficiency, the Board requests that the two States – Massachusetts and Rhode Island – focus primarily on the interrelationship between section 316 and State water quality standards, with particular emphasis on the implications of their particular water quality standards for this permit decision. The Board notes that participants should not discuss or cite data *not* in the administrative record for this permit proceeding. To the extent that a participant has submitted data in connection with a Motion to Supplement the Record that is subject to a Motion to Strike, the participant may discuss such data; however, such discussion will be subject to being stricken if the Motion to Strike is upheld.

The parties shall notify the Clerk of the Board in writing of their intention to participate in the oral argument⁶ and, if they intend to participate, the names of counsel who will present

⁶ As we have noted, certain entities – MA DEP, Rhode Island, UWAG, CLF, STB, KRC, and TRWA – if they so choose, may opt out of participating in the oral argument. If an entity opts out, however, it may not cede time to another participant.

argument, by Friday, August 13, 2004.⁷ Any party not notifying the Clerk of the Board of their intention to participate by that date will be presumed to have opted out of participating. If any party wishes to participate in this oral argument via the EPA video-conferencing equipment in the Administrative Courtroom, they should so indicate in the notification due to the Clerk of the Board, by August 13, 2004, to provide ample time to make arrangements for use of such equipment.

So ordered.

ENVIRONMENTAL APPEALS BOARD

/s/

By: Edward E. Reich
Environmental Appeals Judge

Date: July 23, 2004

⁷ All participants are reminded that if they send any documents by hand delivery *or courier service*, ***including via Federal Express, UPS, and U.S. Postal Express Mail***, such document should be *delivered* to the Board's street address, rather than to the Board's EPA mailing address. The Board's street address is:

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
Colorado Building
1341 G Street, NW
Suite 600
Washington, D.C. 20005

The Board's mailing address is:

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Scheduling Oral Argument in the matter of USGen New England, Inc., Brayton Point Station, NPDES Appeal No. 03-12, were sent to the following persons in the manner indicated:

By Pouch Mail:

Mark A. Stein, Esq.
Jeffrey Fowler, Esq.
Senior Assistant Regional Counsel
Assistant Regional Counsels
U.S. EPA, Region I
1 Congress Street, Suite 1100 (RAA)
Boston, MA 02114-2023

By First Class Mail:

Wendy B. Jacobs, Esq.
Randall Kromm, Esq.
Foley Hoag LLP
155 Seaport Boulevard
Boston, MA 02210-2600

Christopher A. D'Ovidio, Esq.
Conservation Law Foundation
55 Dorrance Street
Providence, RI 02903

Carol Lee Rawn, Esq.
Conservation Law Foundation
62 Summer Street
Boston, MA 02110

Richard Lehan, Esq.
Deputy General Counsel
One Winter Street
Boston, MA 02108

By First Class Mail:

Kendra L. Beaver, Esq.
Save the Bay
434 Smith Street
Providence, RI 02908

Tricia K. Jedeke, Esq.
Special Assistant Attorney General
Department of Attorney General, State of R.I.
150 South Main Street
Providence, RI 02903

Brian Wagner, Esq.
Deputy Legal Counsel
R.I. Department of Environmental Management
235 Promenade Street
Providence, RI 02908

Kristy A. N. Bulleit, Esq.
James Christman, Esq.
James R. Allison, III, Esq.
Hunton & Williams LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219-4074

Joseph L. Callahan
Board of Directors
Taunton River Watershed Alliance, Inc.
P.O. Box 146
Bridgewater, MA 02324

Ann Morrill, Vice President
Kickemuit River Council
90 Dexterdaled Road
Providence, RI 02906

Dated: July 23, 2004

_____/s/
Annette Duncan
Secretary